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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 29

FRED FERNANDEZ,

Appellant,

vs.

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF AFTER ARGUMENT AND BEFORE REARGUMENT OF APPELLANT FERNANDEZ

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INDEX

SUBJECT INDEX

Page

Summary of Argument 1

Argument:

Point I—Action by This Court in the Instant Case Is Not Restrained, as Appellee Argues, by Considerations of State Sovereignty. On the Contrary, This Court Has an Affirmative Duty to Intervene in This Case in Accord With the "New Federalism" Set Out in the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution and the Legislation That Gives Them Force, in Particular 42 U.S.C. § 1983 5

Point II—Although Now Repealed, the *Gitlow* Statutes of the State of New York (Penal Law §§ 160 *et seq.*) Remain Before This Court in the Instant Case Despite Appellee's Attempt to Place This Case *Ex Post Facto* Under New York Penal Law § 240.15. For One Thing, the Offspring Is Infected With the Constitutional Defect of Its Original 11

Point III—Abstention in This Case Could Prevent Appropriate Review if the Trial and Sentence Procedure Followed That in *Epton* .. 12

Point IV—This Court Should Act in the Instant Case Because This Case Brings Before It Again a Ruling (in *Epton*) by the Highest Court of the State of New York That Settles the Law as to a State Statute in 180-Degree Conflict With This Court's Holdings as to Federal and State Legislation in the Realm of Advocacy of Proscribed Political Doctrine 15

Page

Point V—Present Standards of Appropriate Legislative Purpose Require Review of the Legislative Intent Behind the *Gitlow* Statutes 17

Point VI—No "Refinement" by Indictment Can Cure the Infirmity of Unconstitutional State Statutes, as the Appellee Argues in This Instant Case. On the Contrary, Prosecution Under Those Statutes Promises to Deprive the Defendant-Appellant of the Protections of Due Process in the Trial of Other Charges Against Him. The Hazard to the Defendant-Appellant Under This Heading Is Squarely Exampled Before This Court by Appellee's Invocation of "Evidence" Outside the Record Before This Court 20

Point VII—The Procedure Followed in the Impaneling of the Grand Jury Which Indicted Appellant Produced a Grand Jury So Unrepresentative of the Community as to Deprive Appellant of His Constitutional Rights: This Court Should Declare Such Procedures Unconstitutional or Send the Issue Back to the District Court for a Hearing and Findings of Fact 24

Conclusion 30

Citations

CASES:

Baggett v. *Bullitt*, 377 U.S. 360 (1964) 12
Brandenburg v. *Ohio*, 395 U.S. 444 (1969) 20

Cameron v. *Johnson*, 390 U.S. 611 (1968) 7
Carter v. *Greene Cty. Jury Comm.*, —— U.S. ——, 38 L.W. 4082, January 19, 1970 .....4, 24, 25, 28
City of Chicago v. *Atchison T. & S.F. R.R. Co.*, 357 U.S. 77 (1958) 13

Page

Communist Party v. *Control Board*, 367 U.S. 1 (1961) 23

Davis v. *Mann*, 377 U.S. 678 (1964) 12
De Jonge v. *Oregon*, 299 U.S. 353 (1939) 3
Dennis v. *United States*, 341 U.S. 494 (1951) ..15, 16, 18, 19, 21, 22
Douglas v. *City of Jeanette*, 319 U.S. 157 (1943) 7

Gitlow v. *New York*, 268 U.S. 652 (1925) 14, 16, 18, 21, 22, 23

Harman v. *Forssenius*, 380 U.S. 528 (1965) 12
Herndon v. *Lowry*, 301 U.S. 241 (1937) 3

Keyishian v. *Board of Regents*, 385 U.S. 589 (1967) 23
Konigsberg v. *State Bar*, 366 U.S. 36 (1961) 23

Landry v. *Daley*, 288 F. Supp. 200 (D.C. N.D. Ill. 1968) 2, 8, 10

McNeese v. *Board of Education*, 373 U.S. 668 (1963) 13

People v. *Ferguson*, 55 Misc.2d 823, 286 N.Y.S.2d 924 7
People v. *Epton*, 19 N.Y.2d 496, 227 N.E.2d 829 (1967), cert. den. app. dism. 390 U.S. 29, reh. den. 390 U.S. 976 .....2, 12, 13, 15, 16, 21
People v. *Steinhardt*, 47 Misc. 252, 93 N.Y.S. 1026 (1905) 22

Shelton v. *Tucker*, 364 U.S. 479 (1960) 23
Speiser v. *Randall*, 357 U.S. 513 (1958) 23

Thornhill v. *Alabama*, 310 U.S. 88 (1940) 3
Turner v. *Fouche*, —— U.S. ——, 38 L.W. 4090, January 19, 1970 .....4, 24, 25, 26, 27, 28

Whitney v. *California*, 274 U.S. 357 (1927) 22, 23

Page

Yates v. *United States*, 354 U.S. 298 (1958) 19
Younger v. *Harris*, October Term 1969, No. 4 .... 20, 22

Zwickler v. *Koota*, 389 U.S. 241 (1967) 7, 12

STATUTES:

Constitution of the United States

Article VI (Supremacy Clause) 1, 8
First Amendment 2, 4, 19, 20
Thirteenth Amendment 5
Fourteenth Amendment 5
Fifteenth Amendment 5

United States Code

5 U.S.C. § 1181 *et seq.* August 2, 1939 c. 410, 53 Stat. 1147 [The Hatch Act] 18
18 U.S.C. § 594 *et seq.* July 19, 1940 c. 440, 54 Stat. 767 [The Hatch Act] 18
18 U.S.C. § 2385—[The Smith Act] 3, 16, 18, 19, 21
18 U.S.C. § 2386 Oct. 17, 1940 c. 897, 54 Stat. 1201 [The Voorhees Act] 18
28 U.S.C. § 2283 ..... 2, 6, 8
29 U.S.C. § 141 *et seq.* June 23, 1947 c. 120, 61 Stat. 136 [The Taft-Hartley Act] 18
42 U.S.C. § 1983 ..... 1, 2, 5, 6, 8, 26
50 U.S.C. §§ 781 *et seq.*, 811 *et seq.* September 23, 1950, c. 1024, 64 Stat. 987 [The McCarran Act] 18

California Penal Code

Section 938.1 (West's Annotated Codes) 22
Section 11401 (West's Annotated Codes) 22

New York Judiciary Law (former)

Section 596 30
Section 661 30

Page

New York Judiciary Law

Section 609 30

New York Penal Law (former)

Section 160 *et seq.* (*Gitlow-Epton* Statutes) 2, 3, 4, 11, 12, 13, 15, 17, 18, 30
Section 223 13
Section 580 13
Section 2090 13

New York Penal Law

Section 215.70 22
Section 240.15 ..... 11, 12, 13

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 20

FRED FERNANDEZ,

Appellant,

vs.

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF AFTER ARGUMENT AND BEFORE REARGUMENT OF APPELLANT FERNANDEZ

Summary of Argument

I

This Court has an affirmative duty to exercise federal jurisdiction in this case which duty is consistent with the First, Thirteenth, Fourteenth and Fifteenth Amendments and with the purpose of 42 U.S.C. § 1983. Article VI of the Constitution (the Supremacy Clause) requires that

§ 1983 be considered an express legislative exception to 28 U.S.C. 2283. *Landry* v. *Daley*, 288 F. Supp. 200 (D.C. N.D. Ill. 1968). The legislation of the Reconstruction period implementing the Fourteenth Amendment was designed to alter the balance of power between state and federal power so that the full rights of citizenship be secured for all men. Section 2283 is not a jurisdictional statute—its demand is directed to the discretion of the federal court.

II

The repeal of New York's anarchy law statute (Penal Law §§ 160 *et seq.*) does not moot the issue of the constitutionality of the statutes actually invoked in the criminal prosecution of appellant. New York's new anarchy statute (Penal Law § 240.15) suffers from similar constitutional infirmities. The respondent District Attorney has taken inconsistent positions in this regard claiming that 1) the new statute (Penal Law § 240.15) is an effective successor to the old, for it incorporates all the relevant provisions of the repealed statutes and 2) the old statute (Penal Law §§ 160 *et seq.*) is dead and can have no future "chilling effect" on First Amendment rights of appellant or anyone else.

Just as the old, the new statute suffers from overbreadth and vagueness nor does its language spell out any requirement of "clear and present danger."

III

Ultimate review by this Court after conviction under the anarchy statutes could be barred procedurally as this Court found in *People* v. *Epton*, 19 N.Y.2d 496 (1967) when it apparently reluctantly denied certiorari and dismissed

the appeal because the conviction and sentence could be upheld on a valid state ground which this Court deemed unconnected with the anarchy conviction. The appellant herein also charged with the crime of conspiracy to commit arson in the third degree is situated similarly to Epton in that he could be convicted of anarchy and conspiracy to commit arson. If given a year concurrent sentence a valid conspiracy to commit arson conviction could deprive this Court of a review of the already state-court interpreted and reinterpreted *Gitlow* statutes.

IV

The prior unconstitutional interpretation of New York's anarchy statutes (Penal Law §§ 160 *et seq.*) by the highest court of New York State is indeed a matter for federal concern. This Court has repeatedly asserted its authority to examine state court interpretation of state statutes. *Thornhill* v. *Alabama*, 310 U.S. 88 (1940); *Herndon* v. *Lowry*, 301 U.S. 241 (1937); *De Jonge* v. *Oregon*, 299 U.S. 353 (1939); *Dennis* v. *United States*, 341 U.S. 494, 501 (1951).

V

The Smith Act as interpreted in *Dennis* is distinguished from the *Gitlow-Epton* statutes as legislative history of the federal and state legislation reveals.

When the New York anarchy law was originally passed in 1902 the legislative purpose was directed against the threat of anarchy as seen in 1902 which was a generalized xenophobia.

The Smith Act passed by Congress in 1940 was directed against "communist subversion." Smith Act considerations should not be read retroactively into the *Gitlow* statute.

VI

No "refinement" by indictment can cure the infirmity of a state statute, unconstitutional on the grounds of vagueness and for reasons involving First Amendment considerations. Respondents seek relief from this Court by reference to prejudicial facts improperly asserted *dehors* the record.

VII

This Court's holdings in *Carter* v. *Greene Cty. Jury Comm.* (January 19, 1970) and *Turner* v. *Fouche* (January 19, 1970) underline the challenge of appellant to the procedure followed in the impaneling of the Grand Jury which indicted him. The $250 property requirement qualification for all grand jurors is unconstitutional on its face. The denial of all relief including a hearing on the allegations of economic and racial discrimination requires reversal of the decision.

ARGUMENT

POINT I

Action by This Court in the Instant Case Is Not Restrained, as Appellee Argues, by Considerations of State Sovereignty. On the Contrary, This Court Has an Affirmative Duty to Intervene in This Case in Accord With the "New Federalism" Set Out in the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution and the Legislation That Gives Them Force, in Particular 42 U.S.C. § 1983.

A threshold question dealt with extensively in both the brief of the Appellee District Attorney and the Appellee Attorney General of the State of New York is whether or not the exercise of federal jurisdiction is warranted and necessary in the case at bar.

Appellant Fernandez has maintained in each of his three briefs already filed in the Court and will deal with the issue further here, that the case at bar—concerned with such fundamental issues as sedition and Grand Jury due process—presents issues peculiarly appropriate for exercise by this Court of its duty and authority to apply the standards of the federal Constitution to the state legislation before it herein.

The Attorney General assures us in his brief that the pending state action provides full opportunity to test the constitutional claims urged here by appellants and that well-established principles of federalism require that such

claims be adjudicated in the state courts, subject, of course, to review by this Court at some future date [SLB 3].[1]

The District Attorney states categorically that both injunctive and declaratory relief involving a stay of the proceedings are prohibited by Act of Congress [SMB 11]. This argument is apparently bottomed on two counts: the first, equitable—appellants waited 265 days, says the District Attorney, after the commencement of the state criminal proceedings before bringing an action in the federal court. Having appeared in the state court to make motions and applications, his argument goes on, appellants are barred from coming into the federal court for relief.

The second argument is predicated on the provisions of Judiciary Code, 28 U.S.C. § 2283, the source of which is an Act of Congress of 1793. Appellee District Attorney states "[s]imple inspection" of the language of § 1983 makes clear that it cannot be an exception to § 2283 stating: "Such construction would obliterate the prohibition and for any conceivable practical purposes repeal § 2283 and moreover would have done so ninety-eight years ago" [SMB 25].

The argument that appellants have no standing because they waited for 265 days from the time of the initial indictment before filing in the federal court, is without merit. As Appellant Fernandez pointed out in a footnote, on page 12 of his Reply Brief, "Appellants attained a degree of success in these legal proceedings. The state court struck down the first indictment on January 10, 1968

[1] Reference to pages in the Supplemental briefs of District Attorney Mackell appear by SMB followed by a number; to the Supplemental brief of the Attorney General by SLB followed by a number.

(*People* v. *Ferguson*, 55 Misc. 2d 823, 286 N.Y.S.2d 924). Thus this action in the federal court was not brought 265 days after the indictment on which appellant-defendant was charged and will have to go to trial (failing this proceeding), but was brought on March 12, 1968, a little over a month after the superseding indictment was filed in January 1968."

The issue of whether or not a federal court should or has the power to issue an injunction against a pending state criminal proceeding was specifically left open by this Court in *Cameron* v. *Johnson*, 390 U.S. 611 (1968). Appellant Fernandez has contended throughout these proceedings, however, that it is not necessary for this Court to reach the issue of whether or not an injunction is appropriate because a declaratory judgment declaring the statutes attacked unconstitutional on their face, he believes, would meet the exigencies of the situation and be sufficient. See *Douglas* v. *City of Jeanette*, 319 U.S. 157, 165 (1943).

Even as Appellant Fernandez poses the issue, however, the declaratory relief for which he asks still involves a question of the proper scope of federal intervention in state court proceedings. This Court took on the issue as to declaratory relief in *Zwickler* v. *Koota*, 389 U.S. 241, 248 (1967). In *Zwickler* this Court reviewed the history of the delicate balance between federal and state jurisdiction and referred to the affirmative duty of the federal court to "give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims."

Against Appellant Fernandez's claim that this case is one appropriate for federal intervention—see Appellant

Fernandez's Brief for the Appellant, pp. 40 to 43—Appellee District Attorney Mackell argues in the following way [SMB 29]:

> "There is a notion that the presence of circumstances that give rise to the invocation of equity jurisdiction—inadequacy of any remedy at law, probability of grave and irreparable injury, the chilling effect of prosecution under vague and overbroad statutes affecting First Amendment rights—somehow constitutes judge-made exceptions to the legislative prohibitions against stays of state court proceedings. This notion is without foundation in the 176-year judicial history of the Act of Congress. This erroneous notion is traceable in some respects to the failure of the Supreme Court to reach the question of a legislative prohibition and to deny equitable relief on the grounds that judicial requirements for equity jurisdiction had not been met."

A conclusive rebuttal to this argument by Appellee District Attorney is presented by District Judge Will in *Landry* v. *Daley*, 288 F. Supp. 200 (D.C. N.D. Ill. 1968). That decision explores the judicial and historical implications of the legislation at issue here and concludes that under proper circumstances § 1983 is an express exception to § 2283. The Supremacy Clause itself (Article VI of the Constitution) would so require it. That court said at page 221:

> "The legislation of the Reconstruction period was designed not only to secure the full rights of citizenship for all men, but also to alter the balance of power between state and federal authorities which had ex-

isted from the beginning of our federal system. The effect on the federal system of this legislation is evident from even a casual examination. For the first time, the national government was vested with the major responsibility of protecting every individual in the full enjoyment of his rights of person and property. The Fourteenth Amendment is explicit in this regard. It places clear prohibitions on the states and gives Congress the affirmative power to enforce them. The Thirteenth and Fifteenth Amendments contain similar grants to Congress. The Civil War Amendments, therefore, reflect a constitutional revolution in the nature of American federalism.

"This revolution, in turn, represents a historical judgment. It emphasizes the overwhelming concern of the Reconstruction Congresses for the protection of the newly-won rights of freedmen. By interposing the federal government between the states and their inhabitants, these Congresses sought to avoid the risk of nullification of these rights by the states. With the subsequent passage of the Act of 1871, Congress sought to implement this plan by expanding the federal judicial power. Section 1983 is, therefore, not only an expression of the importance of protecting federal rights from infringement by the states, but also where necessary, the desire to place the national government between the state and its citizens.

"In contrast § 2283 and its predecessors date back to the Congress of 1793. Its purpose is primarily to allow state courts to proceed to the determination of issues involving state law which might otherwise be drawn to the federal courts. It represents, therefore, an expression of the concept of American federalism

that the national sovereign shall treat the states with a certain deference and respect in their sphere of operations; it expresses a Congressional policy aimed at preventing 'needless friction' between state and federal courts.

"Thus, when the anti-injunction statute and Civil Rights Act are viewed in their historical posture, their relationship becomes clearer. Section 1983, a product of a later Congress and an expression of an overwhelming Congressional concern for the protection of federal rights from deprivation by state action, would seem to have been intended to be an exception to the general limitation of § 2283.

"Moreover, § 2283 is not a jurisdictional statute. Despite its absolute language, it does not prevent a federal court from enjoining state court proceedings where special circumstances justify such relief. It is essentially a statutory adoption of the doctrine of comity and its demand is directed to the discretion of the federal court." (All footnotes omitted.) *Landry* v. *Daley, supra* p. 223.

POINT II

Although Now Repealed, the Gitlow Statutes of the State of New York (Penal Law §§ 160 et seq.) Remain Before This Court in the Instant Case Despite Appellee's Attempt to Place This Case Ex Post Facto Under New York Penal Law § 240.15. For One Thing, the Offspring Is Infected With the Constitutional Defect of Its Original.

District Attorney Mackell has changed his position in the current brief on reargument from that taken in his brief filed in the last session of this Court. On page 2 of the former brief he refers to the various sections defining anarchy in the New York Penal Law effective up until September 1, 1967—§§ 160 *et seq.* At the top of page 3 of that brief he states:

> "For the sake of clarity a single provision of the current Penal Law, § 240.15, incorporates all of the provisions of the repeated (*sic*) statutes."

In his current brief the District Attorney says at page 34:

> "The anarchy statute before this Court died on the date of its repeal, July 20, 1965, was entombed on the date that repeal took effect (September 1, 1967), and by no stretch of the imagination can—as appellants contend—have any 'inhibiting effect' on the exercise of free speech [that] will operate unhindered."

As pointed out on page 5 of Appellant Fernandez's Supplemental Brief after Argument and before Reargument, the new Penal Law § 240.15 contains the same vague and overbroad language as that in §§ 160 *et seq.;* this fatal

defect is not cured by language limiting advocacy of "the overthrow of the existing form of government" to the State of New York and by making the knowledge of the contents of such doctrine an essential element to the crime. None of these changes reach the claim of constitutional overbreadth and vagueness made by appellants, nor is there written in the new statute the essential requirement of "clear and present danger"—see *infra* p. 21. Accordingly, despite the repeal of §§ 160 *et seq.* by the Legislature, a citizen in New York today can be prosecuted for the non-crime of anarchy under New York Penal Law § 240.15 which shares with the old law the infirmities of overbreadth and vagueness in defining a crime based on speech.

POINT III

Abstention in This Case Could Prevent Appropriate Review if the Trial and Sentence Procedure Followed That in Epton.

This is not a case where abstention by a federal court is appropriate in order to permit state courts an opportunity to resolve an unclear question of state law. The issues presented here were squarely decided by the New York Court of Appeals in *People* v. *Epton*, 19 N.Y.2d 496, 227 N.E.2d 829 (1967), cert. den. app. dism. 390 U.S. 29, reh. den. 390 U.S. 976. This Court has held repeatedly that abstention is improper where state law is settled or was not fairly subject through an interpretation which would render unnecessary or substantially modify the federal question, see *Zwickler* v. *Koota*, 389 U.S. 241, 249-251 (1967); *Harman* v. *Forssenius*, 380 U.S. 528, 534-535 (1965); *Davis* v. *Mann*, 377 U.S. 678, 690-691 (1964); *Baggett* v.

Bullitt, 377 U.S. 360, 375-379 (1964); *McNeese* v. *Board of Education*, 373 U.S. 668, 673, 674 (1963); *City of Chicago* v. *Atchison T. & S.F. R.R. Co.*, 357 U.S. 77 (1958).

Appellant Fernandez in his Supplemental Brief after Argument and before Reargument, p. 16, has pointed out specifically how the New York State Court of Appeals and the court below have failed to meet the standards of this Court, in their construing of §§ 160 *et seq.* in *Epton*. In view of the fact that *Epton* went unreviewed here there is now even more reason for this Court to rule on the *Gitlow-Epton* statutes before they or their offspring (Penal Law § 240.15) are invoked by state prosecutors again.

The posture of *Epton* when it reached this Court foreshadows the situation in the case at bar. It is to be noted here that Fernandez, as well as the other appellants, is charged with other violations of the New York Penal Code in the omnibus indictment against them.[2]

The history of the *Epton* case in this Court is pertinent to the case at bar and presents a persuasive argument for this Court to decide this case now. Epton, as Fernandez in the case at bar, was charged with an additional violation of New York Penal Law (conspiring to commit riot, New York Penal Law §§ 580, 2090) coupled to the charge of anarchy and conspiracy to advocate criminal anarchy. In concurring in a denial of certiorari and dismissal of the appeal Mr. Justice Stewart expressly noted that the riot conviction presented no substantial federal question. And, "since the three sentences (on the anarchy and the riot

[2] In fact, Fernandez has only one other charge against him, conspiring to commit arson in the third degree (New York Penal Law §§ 580, 223) [A 23].

charges) were ordered to run concurrently," he concluded, "... this case does not require the Court to consider either the criminal anarchy conviction or the associated conspiracy conviction." Mr. Justice Stewart went on to say that if the constitutionality of New York's criminal anarchy laws were properly before the Court he would vote "to reconsider the Court's decision in *Gitlow* v. *New York*[3] and decide whether the New York anarchy statutes either on their face or as applied in that case violate the First and Fourteenth Amendments."

With the authority of *Epton* unchallenged on the judicial records there is an open invitation to the state court to repeat the sentencing procedure in *Epton* as to Fernandez. If Fernandez were convicted of all the charges against him, and if the sentences were concurrent and limited in length to the misdemeanor charge, an improper conviction under the anarchy statutes could remain unchallenged in this Court. Under this set of circumstances there would seem to be a denial of the supremacy of federal constitutional guarantees not in accord with fundamental concepts of due process.

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[3] 268 U.S. 652 (1925).

POINT IV

This Court Should Act in the Instant Case Because This Case Brings Before It Again a Ruling (in Epton) by the Highest Court of the State of New York That Settles the Law as to a State Statute in 180-Degree Conflict With This Court's Holdings as to Federal and State Legislation in the Realm of Advocacy of Proscribed Political Doctrine.

The court below asserted categorically that the interpretation of the New York Court of Appeals of the *Gitlow* statute in *Epton* was "entirely a matter of state law and not one of federal concern" (A 64), despite the fact that the new interpretation represented a one-hundred-and-eighty-degree change in the Court of Appeals' former interpretation which interpretation had forty-four years ago been endorsed by this Court. This proposition is a premise recited in the brief of Appellee Attorney General (SLB footnote 11) and was echoed in the arguments before this Court last had on April 1, 1969.

This Court has guarded jealously its authority to examine state court interpretation of state statutes with particular reference to whether or not the interpretation is reasonable and constitutional. In *Dennis* v. *United States*, 341 U.S. 494 (1951) erroneously relied on by appellees as having approved of *Gitlow-Epton* statutes and their application in *Gitlow*, this Court made clear that a different kind of review with different considerations involved arises when this Court reviews legislation passed by Congress as distinguished from legislation passed by state legislatures. State legislation is interpreted more strictly than federal legislation and this Court has customarily weighted its in-

terpretations of federal legislation toward the upholding of constitutionality. Chief Justice Vinson in *Dennis* stated:

> "We are not here confronted with cases similar to *Thornhill* v. *Alabama*, 310 U.S. 88 (1940); *Herndon* v. *Lowry*, 301 U.S. 242 (1937); and *De Jonge* v. *Oregon*, 299 U.S. 353 (1937); where a state court had given a meaning to a state statute which was inconsistent with the federal Constitution" (pp. 501, 502).

At this point, Justice Vinson made clear that a different standard is invoked by this Court when it is reviewing federal statutes from the standards invoked in review of state court interpretations of state legislation.

> "This is a federal statute which we must interpret as well as judge. Herein lies the fallacy of reliance upon the manner in which this Court has treated judgments of state courts. Where the statute as construed by the state court transgressed the First Amendment, we could not but invalidate judgments of convictions" (p. 502).[4]

There is a curious reliance in the briefs of both appellees on the decision in *Dennis* when, in fact, the Court there in its various opinions drew a sharp distinction between *Gitlow* and *Dennis*. Even though this Court there conceded that the Smith Act[5] upheld in *Dennis* was patterned after the 1902 New York Anarchy Law, the Court placed great emphasis on the fact that Congress in passing the Smith

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[4] New York in *Epton* has already obtained its conviction under the unconstitutional anarchy statutes which this Court chose not to review.

[5] 18 U.S.C. §§ 2385, 2387; June 28, 1940, c. 439, 54 Stat. 670.

Act and associated legislation had very much in mind the then current political threat of communist subversion—not contemplated in any way by the New York legislature in 1902.

POINT V

Present Standards of Appropriate Legislative Purpose Require Review of the Legislative Intent Behind the Gitlow Statutes.

As pointed out in Appellant Fernandez's opening brief (pp. 19, 20) the Committee of the Senate of the New York legislature which drafted the law which was to become Sections 160-166, inclusive, of the Penal Law stated:

> " . . . that immigration of recent years (1902) had made the United States the abiding place of numbers of foreigners who, without understanding of our institutions, had brought with them views and prejudices formerly unknown in this country, and doctrines which, if put into effect, would subvert not merely our or any particular form of government, but organized government everywhere."

The purpose of the legislation was: "the prevention of the spreading of doctrines hostile to the safety of our government and of all governments, which inevitably tend to lead those who profess them to commit crimes or at least prepare them mentally for their commission . . . all will agree, . . . that anarchy, by which we mean the doctrine organized government, of whatever nature whether republican or monarchial, should be overthrown by force, is a criminal doctrine, the teaching and spreading of which should be prevented by penal legislation."

In contrast to the legislative purpose of the New York anarchy law, Mr. Justice Frankfurter, concurring in *Dennis* said of the Smith Act:

> "Congress has determined that the danger created by advocacy of overthrow justifies the ensuing restriction on freedom of speech. The determination was made after due deliberation and the seriousness of the congressional purpose is attested by the volumne of legislation passed to effectuate the same ends" (pp. 550, 551).

Thus the *Gitlow* statutes involved a generalized xenophobia, versus the carefully considered historical grounds of national policy of the cold war in *Dennis*.

By a footnote there Justice Frankfurter refers to a number of contemporary Congressional acts aimed at "communist subversion" i.e., the Hatch Act,[6] the Voorhees Act,[7] the Taft-Hartley Act,[8] the McCarran Act[9] (p. 551).

In that same *Dennis* opinion at p. 542, Justice Frankfurter stated: "Our decision today certainly does not mean that the Smith Act can constitutionally be applied to facts like those in *Gitlow* v. *New York*."

No doubt there will always be dispute by legal scholars as to what gloss the *Dennis* case places on legislation in the field of sedition. It is clear, however, from an analysis of the various majority opinions that the *Dennis* case distin-

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[6] 5 U.S.C. §§ 1181 *et seq.*; Aug. 2, 1939, c. 410, 53 Stat. 1147, 18 U.S.C. §§ 594 *et seq.*; July 19, 1940, c. 640, 54 Stat. 767.

[7] 18 U.S.C. § 2386; Oct. 17, 1940, c. 897, 54 Stat. 1201.

[8] 29 U.S.C. §§ 141 *et seq.*; June 23, 1947, c. 120, 61 Stat. 136.

[9] 50 U.S.C. §§ 781 *et seq.*, §§ 811 *et seq.*; Sept. 23, 1950, c. 1024, 64 Stat. 987.

guishes between state interpretation of state legislation in the field of sedition and federal legislation suggesting that this Court will always be more critical of state legislation and state court interpretation of that legislation where considerations of the First Amendment are involved.

In this connection, in *Dennis* the Court in its various opinions took pains to distinguish between the legislation passed in 1902 by the New York legislature and the legislation passed by Congress in 1940. This Court found that it could read into the language of the Smith Act contemporary (1940) historical and political factors which motivated Congress in passing the legislation even though the Smith Act was patterned after the language of those anarchy statutes. Such considerations by no logic can be imported retrospectively to the 1902 New York legislature. To do so would make a travesty of the process of judicial legislative interpretation. Cf. *Yates* v. *United States*, 354 U.S. 298, 319 (1958).

POINT VI

No "Refinement" by Indictment Can Cure the Infirmity of Unconstitutional State Statutes, as the Appellee Argues in This Instant Case. On the Contrary, Prosecution Under Those Statutes Promises to Deprive the Defendant-Appellant of the Protections of Due Process in the Trial of Other Charges Against Him. The Hazard to the Defendant-Appellant Under This Heading Is Squarely Exampled Before This Court by Appellee's Invocation of "Evidence" Outside the Record Before This Court.

Both respondents argue that the instant case is distinguishable from *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969), because in *Brandenburg* the indictment was written in the language of the statute and the present case involved a "refinement of the statute in the indictment" [SMB p. 39, SLB p. 11].

A similar argument is made in the supplemental briefs on reargument of appellee John Harris (*Younger* v. *Harris*, October Term 1969, No. 4, consolidated for argument with the instant cases). Appellee Harris would have this Court distinguish the instant case from his case on the ground that an indictment drawn more narrowly than the unconstitutional statute under which it is brought can confer constitutionality upon such statute.[10]

As pointed out in Appellant Fernandez's brief, the indictment against the Appellant Fernandez, although prolix and containing many prejudicial allegations, is not "re-

[10] Without conceding this proposition, for which a dubious validity might be found where an unconstitutional statute is overbroad, this appellant contends that this proposition cannot hold in the case of a vague statute which violates a defendant's First Amendment rights.

fined." Nor does this alleged "refinement" of the indictment involve any allegation of the necessary element of "clear and present danger" read out of the statute in *Gitlow*, added in *Dennis* to the Smith Act and reintroduced into the state statutes in *Epton*. Each of the anarchy counts against Appellant Fernandez allege illegal advocacy. In count one, such advocacy is by word of mouth and in writing; in count two, the advocacy is by printing, publishing and editing papers and documents, some referred to, others generally described as "printed matter containing and advocating, advising and teaching the doctrine that organized government, to wit, the government of the State of New York . . . should be overthrown by force and violence." The third count charges the appellant with organizing and assembling with others in order "to teach and advocate the doctrine of the overthrow of the government of the State of New York by force and violence." The fourth count is a conspiracy count alleging the illegal advocacy by means of confederating and agreeing with others. Each of the counts has an allegation that the appellant intended the acts which he advocated to be attempted and accomplished. Despite, however, the allegations of intent there is nothing in the indictment which says that the appellant or the appellants with whom he is associated have the present ability to execute the deeds advocated, nor that there was any danger that they might be effected. So impressed with the evil of appellant's intentions and conduct was Appellee Mackell that he devotes four pages of his brief on reargument to a detailed description of weapons, "fuses," "techniques of sabotage," "female revolutionary kits" and other inflammatory descriptive terms which are otherwise absent in the record of this case on appeal, apparently in order to set

the stage—prejudicially, that is—for this Court to rule against appellants on general principles of opposition to "hard-core" crime [SMB 4-6]. The apparent legal justification for this enumeration is the so-called evidence before the grand jury which is not before this Court at this time.

By contrast and because California criminal procedure is different from that of New York, the *Harris* brief specifically discusses the evidence before the grand jury.[11] Appellants in the instant case may never know what evidence was presented to the grand jury and it is inappropriate here for the District Attorney to tell us or for this Court to speculate as to what evidence was before that grand jury.[12]

Appellant Fernandez is further disturbed by the inexplicit premise and the suggested expressed distinction between *Fernandez* and *Harris* (see *Harris* Supplemental Brief, p. 16); in a case involving a similar vague and overbroad statute—the California Criminal Syndicalism Act (California Penal Code § 11401), that a distinction can be made between the two cases because in one, the *Harris* case, only "pure" speech is involved and in the instant case it is "speech brigaded with arms." Time and again this Court has considered in parallel fashion the decisions in *Gitlow* and *Whitney*.[13] (See *Dennis*, 341 U.S. pp. 538, 541; *Commu-*

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[11] California Penal Code § 938.1, West's Annotated Codes, provides *inter alia* that a transcript of the Grand Jury proceedings be served upon a defendant after an indictment has been found.

[12] New York Penal Law § 215.70 makes it a misdemeanor for persons privy to Grand Jury information to make disclosure of that evidence. Cf. *People* v. *Steinhardt*, 47 Misc. 252, 93 N.Y.S. 1026 (1905).

[13] *Whitney* v. *California*, 274 U.S. 357 (1927). This Court expressly overruled *Whitney* in *Brandenburg* v. *Ohio*, *supra*.

nist Party v. *Control Board*, 367 U.S. 1 (Black dissent 147, 148 footnote) (1961); *Speiser* v. *Randall*, 357 U.S. 513, 537 (Douglas concurring), 542 (Clark dissenting) (1958); *Shelton* v. *Tucker*, 364 U.S. 479, 497 (Harlan dissenting) (1960); *Konigsberg* v. *State Bar*, 366 U.S. 36, 63 (Black dissenting) (1961). Thus the overruling of *Whitney* would seem to overrule *Gitlow*. More specifically, *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967), implicitly overruled *Gitlow*. Parenthetically here, Appellant Fernandez could be an incidental casualty of this argument were it to assume any validity. In a 48-count indictment containing six anarchy counts and 37 weapons counts, Appellant Fernandez is not charged with a single weapons count. Nonetheless, weapons are referred to as part of the anarchy counts and then, as a bootstrap argument, Appellee Mackell tells us that the anarchy charges are necessary to his indictment because the "unlawful intent" for the possession of these weapons contained in 37 counts of the indictment is not predicated upon the *usual* purpose of robbery or assault. Rather, the purpose is the overthrow of the "government of the State of New York and its various political subdivisions and its agencies, by force and violence, to wit, the use of rifle shotguns, firearms, bombs and ignited gasoline against publicly owned and operated transportation facilities, and against executive officials of said State and its various political subdivisions and agencies, including peace officers thereof, and by assassination of executive officials, and by other unlawful means and with the further intent that said acts be presently attempted and accomplished" [SMB 37].

The premise here is that the alleged illegality of appellants' intention with respect to arms or to arson will vali-

date and constitutionalize an otherwise vague, overbroad, moribund statute which by its own terms proscribes the advocacy of doctrine only. It would seem that the references to weapons and techniques of sabotage contained in the District Attorney's brief are calculated to have the same (but antithetically complementary) effect on this Court as the charges of anarchy will have upon a court and jury if a trial of this action in its present posture is permitted by this Court to take place.

POINT VII

The Procedure Followed in the Impaneling of the Grand Jury Which Indicted Appellant Produced a Grand Jury So Unrepresentative of the Community as to Deprive Appellant of His Constitutional Rights: This Court Should Declare Such Procedures Unconstitutional or Send the Issue Back to the District Court for a Hearing and Findings of Fact.

This Court has had occasion to consider the issues raised by appellant's challenge to the New York judiciary law in *Carter* v. *Greene Cty. Jury Comm.*, —— U.S. ——, 38 L.W. 4082, January 19, 1970 and *Turner* v. *Fouche*, —— U.S. ——, 38 L.W. 4090, January 19, 1970.

In *Carter* a group of Negro citizens brought a class action for declaratory relief, to enjoin the systematic exclusion of Negroes from Greene County juries and an order vacating the appointments of the jury commissioners.

A three-judge court convened below had conducted an extensive evidentiary hearing after which it found that the jury selection process in Greene County departed from the

statutory mandate and that "there is an invalid exclusion of Negroes on a racially discriminatory basis." Accordingly, the District Court ordered the Jury Commissioner "to take prompt action" to remedy the situation.

The District Court did not, however, enjoin the enforcement of the statutory provisions on their face or direct the appointment of Negroes to the jury commission. This Court said there however, "the federal courts are not incompetent to fashion detailed and stringent injunctive relief that will remedy any discriminatory application of the statutes at the hands of the officials empowered to administer it" [4087].

The challenge to the Alabama statute in *Carter* on its face is similar to the challenge in the case at bar with reference to the subjective criteria for the selection of grand jurors. This Court answering this challenge held that a state statute for jury selection may sanction such subjective standards declaring: "the states remain free to confine the selection to citizens, to persons meeting specified qualifications of age, educational attainment and to those possessing good intelligence, sound judgment and fair character" [4085, 4086].

Respondents, no doubt, will argue that the holding in *Carter* disposes of appellant's challenge to the judiciary statutes providing for the impaneling of grand jurors. Not so. In *Carter* the three-judge District Court at the request of the plaintiffs below held a hearing which resulted in a finding of the District Court that "there is an invalid exclusion of Negroes [from the jury] on a racially discriminatory basis," and directed the jury commissioners to take prompt action to compile a jury list " . . . in accordance

with the laws of Alabama and . . . constitutional principles" [4084].

The court below in the case at bar held no hearing on the claim made by appellant that in consequence of the subjective standards of selection applied by the County Clerk—the composition of the grand jury which indicted him was not composed of a cross-section of the community and so not a jury of his peers, economically or racially. (See Brief for Appellant, pp. 3, 49.)

Appellant also challenged the mandatory statutory requirement in effect at the time the grand jury which indicted him was selected of a $250.00 minimum property requirement.

In *Turner,* the thrust of the complaint brought under 42 U.S.C. § 1983 was that Negroes have no voice in school management because there were no Negroes on the School Board. A requirement for school board membership was the status of freeholder or property owner. The School Board was chosen by the grand jury which had been selected by the jury commissioner.

Again after an extensive hearing (denied in the case at bar) the court first found that Negroes were being systematically excluded from the grand jury—not offset by token inclusion—and accordingly Negroes had little chance for appointment to the School Board.

Thereafter a new grand jury was chosen numbering a greater percentage of Negroes. The court below held this grand jury to be not unconstitutional nor illegal. With the facts thus settled, the lower three-judge court held requirements of the numbers of the board to be freeholders to be not unconstitutional.

This Court held otherwise. It held that the affirmative attempt to increase the Negro representation on the grand jury did not meet the standards for "corrective action by a federal court charged with responsibility of enforcing constitutional guarantees."

Squarely congruent with the $250.00 property qualification for service on the New York Grand Jury in the case at bar was a freeholder requirement for membership on the School Board of Taliaferro County in *Turner*. As to that this Court said:

> "We may assume that the appellants have no right to be appointed to the Taliaferro County Board of Education. But the appellants and the members of their class do have a federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications. The State may not deny to some the privilege of holding public office that it extends to others on the basis of distinctions that violate federal constitutional guarantees" [4094].

This Court determined that such a requirement was an "invidious discrimination."

This Court also did not accept the testimony of officials that as to race discrimination, it was "never observed." Said this Court:

> "The testimony of the jury commissioner and Superior Court judge that they included or excluded no one because of race did not suffice to overcome appellant's prima facie case" [4093].

In the case at bar the court below denied appellant a hearing with regard to the challenge to the statute and the practice under that statute of selecting grand jurors. Of even less weight in the testimony of the jury commissioner and the Superior Court judge in *Turner* should have been the affidavit of the County Clerk of Queens County. Said the court below:

> "... a property requirement had no significance in the selection of jurors since [the County Clerk] had long proceeded on the theory, whether factually correct or not, that everyone possessed the minimal amount of property necessary" [A. p. 68].

The court below would have the appellant's only relief in the long appellate process of raising the prejudice of an improper grand jury at the point of conviction and appeal and possibly certiorari to this Court. The court below said:

> "However all this may be, we see no reason why plaintiff's contention as to grand jury selection cannot be effectively presented in the New York court and to the Supreme Court on review. ... Indeed, these questions go into the validity of this and any other indictment, being peculiarly a matter to be determined by the state courts in the first instance" [A. pp. 68, 69].

Appellant has little hope for relief along that route. See cases cited in Brief for Appellant, p. 39.

It is appellant's contention here just as in *Carter* and *Turner* that the language of the statute, together with the practice followed under it in New York, denied him a jury of his peers both economically and racially. In *Carter* this Court stated:

> "Once the state chooses to provide grand and petit juries, whether or not constitutionally required to do so, it must hue to several constitutional criteria in ensuring that the section of membership is free of racial bias . . . that kind of discrimination (racial) contravenes the very idea of a jury—'a body truly representative of the community,' composed of 'the peers or equals of the person whose right is selected or summoned to determine; that is of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds'" [4085].

If this Court does not find the $250.00 minimum property requirement for a grand juror discriminatory in and of itself, certainly appellant is entitled to a hearing on the entire issue of whether or not the grand jury which indicted him was properly and constitutionally constituted. He is further entitled to federal declaratory or injunctive relief now before he is subjected to a trial.

Conclusion

The judgment of the court below should be reversed and the anarchy laws in the State of New York (Penal Law §§ 160 *et seq.*) should be declared unconstitutional and unconstitutional as applied to appellant. This Court should further either declare the relevant sections of the New York Judiciary Law § 596, Subdivision 3, Subdivisions 609 and 661 unconstitutional or grant an evidentiary hearing to determine whether or not unconstitutional procedures were followed in the impaneling of the grand jury which resulted in an indictment of appellant.

Respectfully submitted,

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